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In the

Supreme Court of the United States

October Term, 1941.

No. 711.

H. J. GORMAN, City Treasurer of Kansas City, Missouri, and FRANK MCCABE, City Assessor of Kansas City, Missouri, *Petitioners*,

vs.

THE WASHINGTON UNIVERSITY, *Respondent*.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

PETITIONERS' BRIEF.

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PETITIONERS' BRIEF.

I.

The Opinion Below.

The opinion of the Supreme Court of the State of Missouri apears in the record beginning at page 131 and is reported in 153 S. W. (2d) 35 (not yet officially reported).

II.

Statement of Grounds on which Jurisdiction of this Court Was Invoked.

This cause is before this Court upon writ of certiorari issued by this Court to the Supreme Court of the State of Missouri under authority of Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, Ch. 229, 43 Stat. 936, 937, 28 U. S. C. A., Sec. 344.

III.

Constitutional Provisions and Statutes Involved.

The defense of the petitioners here and defendants below is based upon the following constitutional and statutory provisions:

1. Section 2 of Article XIII of the Constitution of Missouri of 1820 (R. 50), reserving to the people of the State of Missouri the exclusive right of altering and abolishing their Constitution and form of government.

2. Section 7 of Article I of Ch. 34 of the Revised Statutes of Missouri, 1845 (R. 48), providing that the charter of every corporation thereafter granted by the Legislature should be subject to alteration, suspension and repeal.

3. Section 16 of Article XI of the Constitution of the State of Missouri of 1865 (R. 50), declaring all property in the state to be subject to taxation except that specifically exempted by the Constitution.

4. Sections 6 and 7 of Article XI of the Constitution of the State of Missouri adopted in 1875 (R. 9-10), declaring void all exemptions except those specifically enumerated in the Constitution.

5. Sections 9742 and 9743, R. S., Mo., 1929 (R. 10), now Sections 10936 and 10937, R. S., Mo., 1939, prohibiting the exemption of property from taxation except those classes of property therein specifically enumerated.

The respondent herein contends that the aforementioned provisions of the Constitution of 1865 and that of 1875 and the statutory provisions enacted pursuant thereto are violative of Section 10 of Article I of the Constitution of the United States (R. 10) as applied to the taxation of the property here involved.

IV.

STATEMENT OF THE CASE.

This was an action brought by the respondent, Washington University, of St. Louis, Missouri, to enjoin the petitioners, the Treasurer and the Assessor of Kansas City, Missouri, from levying and collecting real estate taxes on property located in Kansas City, Missouri, owned by the respondent.

Upon trial of the case in the Circuit Court of Jackson County, Missouri, an injunction was granted. Your petitioners took an appeal to the Supreme Court of Missouri, which court affirmed the judgment of the trial court, making permanent the injunction. Following this decision, petition for certiorari was granted by this Court.

It is the contention of the respondent University that the property here involved is exempt from taxation by reason of a provision contained in the charter granted to the Eliot Seminary by the Legislature of the State of Missouri in 1853. The tax exemption provision of this charter is as follows:

> "All property of said corporation shall be exempt from taxation and the sixth, seventh and eighth sections of the first Article of the Act concerning corporations, approved March 19th, 1845, shall not apply to this corporation." (R. 48.)*

In 1857, the name of the original grantee was changed to "The Washington University" by legislative amendment to the original charter (R. 5-7). At the time the

*Section 7 referred to is as follows:
"The charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension or repeal in the discretion of the legislature." (Ch. 34, Art. I, Sec. 7, R. S., Mo., 1845.)

original charter was granted to Eliot Seminary and at the time this charter was amended, the Constitution of Missouri of 1820 was in full force and effect. Section 2 of Article III of this Constitution (R. 50) provided:

> "* * * That the people of this state have the inherent, sole and exclusive right of regulating the internal government and police thereof, and of altering and abolishing their constitution and form of government whenever it may be necessary to their safety and happiness."

In 1865, the people of the State of Missouri adopted a new Constitution which provided (Sec. 25) that the General Assembly should not pass special laws exempting any property of any named person or corporation from taxation (R. 12). Thereafter, the Legislature provided for the taxation of all property belonging to eleemosynary corporations except that which was expressly exempted from taxation by the provisions of the Constitution of 1865. It is not contended by the respondent herein that the property in question is within the exemptions provided for in this Constitution.

Immediately after the adoption of the Constitution above referred to, one Rowse, of St. Louis County, assessed taxes against the property of Washington University located in St. Louis County. The University sought to enjoin the collection of these taxes on the theory that its charter was a contract within the protection of Section 10 of Article I of the Federal Constitution. This contention was rejected by the Supreme Court of Missouri and it was held by said court that the charter of the respondent was not a contract because there was no consideration for the legislative grant (*Washington University* v. *Rowse*, 42 Mo. 308). The respondent appealed from this decision to the United States

Supreme Court, and this Court in a four to three decision held that consideration for the grant of tax exemption was to be presumed from the purposes to be accomplished by the corporation, and held that the resultant contract was within the protection of the "contract clause" of the Federal Constitution (*Washington University* v. *Rouse*, 75 U. S. 439). This case was decided concurrently with the case of *Home of the Friendless* v. *Rouse*, 75 U. S. 430, and the opinion of the majority in the two cases was based upon identical principles.

In 1875, the people of the State of Missouri again adopted a new Constitution which provided (Art. X, Secs. 6 and 7) (R. 9-10) that certain property should be exempt from taxation and that all other exemptions should be void.*

The respondent does not contend that any of the property here involved is exempt from taxation by virtue of Section 6 of Article X of this Constitution, nor does respondent deny that these two constitutional provisions, if valid, have the effect of repealing the respondent's alleged exemption from taxation.

All of the property involved in this action was acquired by the respondent subsequent to the adoption of the Constitution of 1875.

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*Article X (Missouri Constitution):

"Sec. 6—*Property exempt from taxation.* The property, real and personal, of the state, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable, also, such property, real or personal, as may be used exclusively for agriculture or horticultural societies: *Provided*, that such exemption shall be only by general law.

"Sec. 7—*Other exemptions void.* All laws exempting property from taxation, other than the property above enumerated, shall be void."

V.

SPECIFICATIONS OF ERROR.

1. The Supreme Court of Missouri erred in holding that it was bound by the opinion of the majority of this Court in *Washington University* v. *Rouse*, 75 U. S. 439, in determining the instant case.

2. The Supreme Court of Missouri erroneously failed and refused to recognize the effect of the decision of this Court in *Erie Railroad v. Tompkins*, 304 U. S. 64, upon the determination of the instant case.

3. The Supreme Court of Missouri, deeming *Washington University* v. *Rouse, supra*, as controlling, erred in holding that the charter of the respondent is a contract protected by the "contract" clause of the Federal Constitution.

4. The decision of this Court in the case of *Washington University* v. *Rouse*, 75 U. S. 439, upon which the decision in the Supreme Court in the instant case was based, is erroneous and should be overruled.

ARGUMENT.

I.

The decision of the Missouri Supreme Court is contrary to the principles established by this Court in the case of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64.

The contention of the respondent Washington University that the Missouri Supreme Court was bound to follow the decision of this Court in the case of *Washington University* v. *Rouse*, 75 U. S. 439, in determining that the charter of the respondent constituted a contract, was sustained by the Missouri Supreme Court in its decision of the case at bar, *Washington University* v. *Gorman*, 153 S. W. (2d) 35 (not yet officially reported). The Missouri Supreme Court resolved the question of the law to be applied in the instant case in the following language:

> "There can be no question but that the decision of the United States Supreme Court in the University's case against Rowse is today the law and is commandingly decisive of this case. We must abide by it now as we did in *Washington University* v. *Baumann, supra.*"

In the majority opinion of the United States Supreme Court in the case of *Washington University* v. *Rouse*, the Court applied what was termed "the well-settled doctrine of this Court" in determining that the charter of the respondent was a contract. "The well-settled doctrine" referred to was the doctrine of a presumed consideration applied in the *Dartmouth College* case, 4 What. 518, as this case was construed by this Court in *Home of the*

Friendless v. *Rouse*, 75 U. S. 430, l. c. 437, decided concurrently with *Washington University* v. *Rouse*, *supra*, in which latter case the principles announced in the former were adopted by reference. In the *Home of the Friendless* case, the Court said, l. c. 437:

> "There is no necessity of looking for the consideration for a legislative contract outside of the objects for which the corporation was created. These objects were deemed by the legislature to be beneficial to the community, and this benefit constitutes the consideration for the contract, and no other is required to support it. This has been the well-settled doctrine of this court on this subject since the case of *Dartmouth College* v. *Woodward*."

Thus upon this theory of supplanting the law of a state with a federal common law rule, the decision of the Missouri Supreme Court as to what constitutes consideration for a binding contract was overruled.

At the outset, let it be conceded that the United States Supreme Court, in cases where the protection of the constitutional provision against impairment of contracts is invoked, must determine for itself the nature and existence of the alleged contract. It is, however, our contention that since the decision of this Court in the case of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, the independent judgment of this Court must be exercised in the light of the law of the state as declared by its highest court, as to the facts necessary to constitute the essential elements of a contract, and as here, as to what facts are necessary to constitute a legal consideration that will support a binding contract. If the state court's decision on such matters is not wholly arbitrary and contrary to reason, this Court must accept it in determining the existence of

a contract. This, we think, is true in all cases including those cases in which the constitutional prohibition against impairment of contracts is involved.

Specifically, our contention is that the law which is to be applied in determining whether or not the charter grant of tax exemption to the respondent is contractual, is the law of the State of Missouri, as declared in the opinion of Judge Wagner of the Missouri Supreme Court in the case of *Washington University* v. *Rouse, supra.* The Court there said (l. c. 316):

> "The charter is unusual and of marked peculiarity. There is no preamble to the act, and no limit to its duration or to the amount of property which it may hold. No obligations are cast upon the corporation; it stipulates for nothing, and agrees to give no consideration whatever for the extraordinary privileges thus granted. The intention was, we suppose, to establish an institution of learning, but there is nothing to prevent the corporation from accumulating and absorbing millions of wealth, and there is no corresponding obligation imposed to compel it to carry out any contemplated object."

This is tantamount to a judicial determination by the highest court of Missouri that "the public purposes to be attained" by the incorporation of the grantee (which was held by the United States Supreme Court in the Rouse case to constitute consideration) did not constitute a valid consideration.

The Erie Railroad decision, *supra,* has unequivocally repudiated the doctrine of a federal common law. Since that decision, this Court, in determining whether or not the charter of the respondent University is a contract, should apply the rule of law announced by the Supreme Court of Missouri in *Washington University* v. *Rouse, supra,* as to what constitutes the element of considera-

tion, said decision being the last free and independent expression of the Missouri Supreme Court on this question. The confusion incident to two rules of common law, state and federal, which was terminated by the decision in the Erie Railroad case would, upon the contention of respondent and in the recent opinion of the Supreme Court of Missouri, be continued in the construction of contracts where the constitutional provision against impairment is involved. We urgently submit that the doctrine of the Erie Railroad case applies to the construction of a contract, even where the contract provision of the Federal Constitution is involved.

Mr. Justice Brandeis, in an opinion in *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, said (l. c. 78):

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

The exception in the first phrase of the paragraph quoted above forms the basis for respondent University's contention that all the matters involved in this case are still governed by a "federal common law rule" as applied in this Court's decision in the Rouse case, *supra*. Under respondent's contention, a contract which is alleged to have been impaired would, regardless of the fact that the theory of a "federal common law" has been abolished, be tested by the principles of what was formerly regarded

as the common law of the nation. A construction of the same contract, if no question of impairment were involved, would unquestionably be governed by the state law. An approval of respondent's position would thus perpetuate the evils of confusion and lack of uniformity which were sought to be eliminated by the decision of the Erie Railroad case, *supra*. The exception ("* * * matters governed by the Federal Constitution or by Acts of Congress") relied upon by respondent University, should, on the contrary, be construed so as to effectuate the principles of the Erie Railroad decision. The words, "except in matters governed by the Federal Constitution or by Acts of Congress," do not, in our opinion, affect the applicability of the decision in the Erie Railroad case to the case at bar.

If not expressly, certainly by unequivocal inference, this Court declared in the Erie Railroad case, that federal courts were concluded by the decisions of state courts as to questions involving obligations under contracts entered into and to be performed within the state. In pointing out the extent to which federal courts had exercised a judgment independent of the decisions of state courts, this Court said (304 U. S., l. c. 75):

> "The discrimination resulting became in practice far-reaching. This resulted in part from a broad province accorded to the so-called 'general law' as to which federal courts exercised an independent judgment. In addition to questions of purely commercial law 'general law' was held to include the obligations under contracts entered into and to be performed within the state, the extent to which a carrier operating within a state may stipulate for exemption from liability for his own negligence or that of his employee; the liability for torts committed within the state upon persons resident or property located there, even where the question of liability de-

pended upon the scope of a property right conferred by the state; and the right to exemplary or punitive damages. Furthermore, state decisions construing local deeds, mineral conveyances, and even devises of real estate, were disregarded."

That the doctrine of the Erie Railroad case, *supra,* is applicable to the interpretation of contract provisions, was decided by this Court in the case of *Ruhlin et al.* v. *The New York Life Ins. Co.,* 304 U. S. 202, l. c. 205:

"It was stated in *Carpenter* v. *Providence Washington Ins. Co.,* 16 Pet, 495, 511, that questions concerning the proper construction of contracts of insurance are 'questions of general commercial law,' and that state decisions on the subject, though entitled to great respect, 'cannot conclude the judgment of this court.' A limitation was put on this doctrine in *Mutual Life Ins. Co.* v. *Johnson,* 293 U. S. 335, 340. Putting aside all questions of power, the Court interpreted a specific provision of an insurance contract in accordance with the decision of the highest court of the State of Virginia, where delivery was made. 'All that is here for our decision is the meaning, the tacit implications, of a particular set of words, which, as experience has shown, may yield a different answer to this reader and to that one. With choice so "balanced with doubt," we accept as our guide the law declared by the state where the contract had its being.' The decision in *Erie R. Co.* v. *Tompkins, ante,* p. 64, goes further, and settles the question of power. The subject is now to be governed, even in the absence of state statute, by the decisions of the appropriate state court. The doctrine applies, though the question of construction arises not in an action at law, but in a suit in equity."

To the same effect, see *New York Life Ins. Co.* v. *Jackson et al.,* 304 U. S. 261, and *Rosenthal* v. *New York Life Ins. Co.,* 304 U. S. 263.

In the following decisions of the Circuit Courts of Appeal, the decisions of the state courts have been held to be controlling in the construction of contracts:

Dayton & Michigan R. Co. v. *Commissioner of Internal Revenue*, 112 F. (2d) 627, l. c. 630.
Vero Beach v. *Rittenoure Inv. Co.*, 113 F. (2d) 269, l. c. 272 (certiorari denied, 311 U. S. 710).
Breslin v. *National Surety Co.*, 114 F. (2d) 65, l. c. 67.
Lucking v. *Schram*, 117 F. (2d) 160, l. c. 161.

Our contention that the existence of respondent's perpetual exemption from taxation and its validity as a contract must now be determined by the law of the State of Missouri, is supported by the only case decided upon this question by a state court since the *Erie Railroad* decision. We refer to the case of *Trustees of Phillips Exeter Academy* v. *Exeter*, 90 N. H. 472. The plaintiff in this action was incorporated in 1781 by act of the General Assembly of the State as an educational institution. The charter by which it was created granted to the Academy a perpetual exemption from taxation. In 1913 the Legislature passed an act repealing all special exemptions from taxation. The plaintiff in this action contended that the statute repealing tax exemptions had the effect of impairing the Academy's contract with the State, which contention the New Hampshire Supreme Court overruled. In its decision that court commented upon the effect of the *Erie Railroad* decision upon the questions involved as follows, l. c. 483:

> "The Federal Constitution requires no enforcement of invalid contracts, and the states, and not the nation, now determine between valid and invalid contracts unless a question under that constitution is presented. In all other cases, upon the issue of construction of state legislation, the state's own com-

tion law now controls, even when federal jurisdiction may be asserted in applying and enforcing it. The theory of a common law of the nation, adopted in *Swift* v. *Tyson,* 16 Pet. 1, 8, decided in 1842, has been abandoned by the case of *Erie Railroad* v. *Tompkins,* 304 U. S. 64. The federal courts now follow a state's own judicial construction of all its laws when no issue of federal authority arises, determining in independent judgment the state law only when its conflict with the federal constitution or acts of Congress is claimed. Decision of the validity of the plaintiff's exemption is therefore to be reached by determination of the local law. 'There is no federal general common law.' *Erie Railroad* v. *Tompkins, supra,* 78."

The well-considered opinion in the *Exeter Academy* case, *supra,* is in complete harmony with our contention in the case at bar, as evidenced by the following quotation therefrom (l. c. 484):

"While the declaration of local law by the courts where it is in force may be held erroneous, that law, and not some other law, is to be determined, as it is thought, to test whether a contract made subject to it is valid and creative of obligation. The rule in the *Erie Railroad* case and the rule that 'great weight' is to be attached 'to the views of the highest court of the State' upon the issue of contract obligation (*Higginbotham* v. *Baton Rouge,* 306 U. S. 535, 538, 539) are not only consonant with each other but would seem to be in substantial and virtual accord. The *lex loci contractus* being understood to be determinative of the existence and validity of a contract, and to embrace the issue of authority to enter into a contract, it is considered that it is property ascertained by treating it as a problem of local law, although the conclusion may be exceptional to the rule generally prevailing in other jurisdictions upon a like state of facts. It is thought that a state may

adopt its own judgment and policy in classifying agreements as valid contracts or void undertakings. 'The determination follows the state law.' *Texarkana* v. *Company*, 306 U. S. 188, 198."

Other pertinent portions of this opinion are to the same effect.*

This decision of the New Hampshire Supreme Court is obviously in conflict with the opinion of the Missouri Supreme Court in the instant case in that the Missouri Supreme Court in the case at bar has held that the United States Supreme Court's decision in the Rouse case, *supra*, was still "the law" and "commandingly decisive of this case." We respectfully submit that the decision in the Exeter Academy case, *supra*, correctly interprets and applies the principles announced in the Erie Railroad case, while, on the other hand, the Missouri Supreme Court, misconstruing the effect of the Erie Railroad decision, held this decision was not in anywise relevant to a determination of the issues involved in the case at bar. (See *Washington University* v. *Gorman*, 153 S. W. [2d], l. c. 37.)

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*"Although the *Erie Railroad* case does not affect the authority of the United States Supreme Court to act independently in passing on the validity of the plaintiff's exemption here in issue, it necessarily, as it is thought, affects the manner of treatment in dealing with the problem. Application of a federal common law theretofore held to exist may not be made, in view of the declaration that in fact it has never existed. As it is understood, the federal Supreme Court will now determine the local law without reference to that elsewhere or generally prevailing or to the nonexistent common law of the nation. Thus, the difference of treatment becomes material and important. It is considered that the prior decisions of the federal Supreme Court holding that special tax exemptions are valid contracts rest on a view taken of a national common law or of special local constitutional authority therefor. And the conclusion appears to follow that the cases in which those decisions were rendered are not required, or even permitted, to be accepted as authority controlling the case here."

II.

The decision of the United States Supreme Court in the case of *Washington University* v. *Rouse*, 75 U. S. 439, is erroneous and should be reversed by this Court.

The respondent, Washington University, relies upon the decision of the Supreme Court of Missouri in the case of *Washington University* v. *Gorman*, 153 S. W. (2d) 35 (not yet officially reported), which decision was bottomed upon the decision of this Court in *Washington University* v. *Rouse*, 75 U. S. 439, which was held by the Missouri Supreme Court in its decision to be "commandingly decisive" of this case.

We call the Court's attention to the fact that the Rouse case was decided by this Court more than seventy years ago and that the decision of the majority was dissented from by three of the seven Justices then sitting. Mr. Justice Miller, the writer of the dissenting opinion, which was concurred in by Mr. Justice Field and Chief Justice Chase, predicted that the doctrine announced by the majority of the Court was a doctrine that "must finally be abandoned."*

Mr. Justice Miller renewed his protest against this same doctrine in the case of *New Jersey* v. *Yard*, 95 U. S. 104, wherein he said, l. c. 114:

**Washington University* v. *Rouse*, 75 U. S., l. c. 444:

"With as full respect for the authority of former decisions, as belongs, from teaching and habit, to judges trained in the common-law system of jurisprudence, we think that there may be questions touching the powers of legislative bodies, which can never be finally closed by the decisions of a court, and that the one we have here considered is of this character. We are strengthened, in this view of the subject, by the fact that a series of dissents, from this doctrine, by some of our predecessors, shows that it has never received the full assent of this court; and referring to those dissents for more elaborate defence of our views, we content ourselves with thus renewing the protest against a doctrine which we think must finally be abandoned."

> "The writer of this opinion has always believed, and believes now, that one legislature of a State has no power to bargain away the right of any succeeding legislature to levy taxes in as full a manner as the Constitution will permit. But, so long as the majority of this court adhere to the contrary doctrine, he must, when the question arises, join with the other judges in considering whether such a contract has been made."

Since the decision of this Court in the case of *Washington University v. Rouse*, there have occurred certain changes, both in legal concept and in the situation of the parties to this alleged contract, which we deem pertinent to a decision of the instant case.

At the time the Legislature of Missouri granted an exemption from taxation to Eliot Seminary, it was the purpose of the Legislature to encourage this infant institution. This appears from the opinion of Judge Wagner in the Rowse case, in which he said, l. c. 326:

> "When the charter of the University was granted, the Legislature might have considered it reasonable to foster and encourage it in its infancy and confer upon it privileges and immunities while struggling into existence. But no provision is made in express terms, or by reasonable intendment, that those immunities should be perpetual and have the effect of withdrawing millions of subsequently acquired property from taxation."

This purpose of the Legislature has long since been served. The respondent, Washington University, has become a tremendously wealthy institution. The record in this case (R. 66 to 100) reveals the vast extent and value of its income-producing assets. Certainly, the respondent is capable of assuming its share of the tax burden along with other institutions of learning in this state which have not been favored with exemptions from taxation.

The power of taxation has, in recent years, at least, been regarded by this Court as the most fundamental power of a sovereign state. The alleged irrepealable surrender of this power should be carefully scrutinized by this Court in the light of recent judicial trends in this regard.

(A) It was beyond the power of the Legislature to grant a perpetual exemption from taxation.

There are certain powers inherent in sovereignty which have long been considered so essential that they cannot be surrendered by a legislative contract. The police power and the power of eminent domain are unquestionably of such a nature. It has long been held that the contract clause of the Federal Constitution may not be invoked to invalidate state laws enacted in the exercise of the police power or the power of eminent domain, notwithstanding an attempt by the State to abdicate such powers by an express grant.*

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*West River Bridge Co. v. Dix et al., 47 U. S. 507, l. c. 532:

"But into all contracts, whether made between states and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain. This right does not operate to impair the contract effected by it, but recognizes its obligation in the fullest extent, claiming only the fulfilment of an essential and inseparable condition."

Atlantic Coast Line Railroad Co. v. City of Goldsboro, 232 U. S. 548, l. c. 557:

"Conceding, for argument's sake only, the utmost that may be claimed as to the charters and property rights of plaintiff in error, we still have yielded nothing that may defeat the exercise of the police power by the State, or by its authorized agency."

And again, l. c. 558:

"For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise." Citing cases.

That rights which are subject to state restriction cannot be put permanently beyond the power of the State by the making of a contract, was held by this Court in the case of *Hudson County Water Co.* v. *McCarter, Attorney General*, 209 U. S. 349, wherein the Court said (l. c. 357):

> "The defense under the Fourteenth Amendment is disposed of by what we have said. That under Article I, Section 10, needs but a few words more. One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter."

It is our earnest contention that the principle applied in the above cases to police power and to the power of eminent domain should, under every rule of logic, be applied to the protection of the people of the State from an abridgment of the power upon which the continued existence of the State depends—the power of taxation. The essential nature of this power has long been recognized by this Court and has recently been declared to be "the most basic power of government." *Wis.* v. *J. C. Penny Co.*, 311 U. S. 435, l. c. 444. It is inconsistent to hold that this most basic power of government may be irrevocably surrendered by a State Legislature while other powers which depend for their exercise upon the power of taxation may not be so surrendered. Without the power of taxation a sovereign state could not, of course, exercise the police and protective power and the power of eminent domain. Upon the power of taxation ultimately depends the exercise of all other powers and rights of a sovereign state. To hold, then, that the grant of tax exemption contained in the original charter of Eliot Sem-

inary constituted an irrevocable grant—an irrepealable contract, superior to the power of the State and to the will of the people of this State, is to hold that any one of the annual Legislatures of the State may contract away forever the State's most fundamental prerogative. It is to hold that a transient Legislature may destroy the foundation upon which an ordered society must depend. This thought was well expressed by Judge Wagner, of the Missouri Supreme Court, in the Rowse case, 42 Mo., l. c. 325:

> "It is incompetent, as before observed, for one legislature to attempt to derogate from the power or tie up the hands of a subsequent legislature. For an irrepealable contract of the character here presented, no authority or precedent is to be found."

This principle was vigorously concurred in by Mr. Justice Miller in his dissent in the Rouse case in this Court, wherein he stated, l. c. 443:

> "We do not believe that any legislative body, sitting under a state constitution of the usual character, has a right to sell, to give, or to bargain away forever the taxing power of the state. This is a power which, in modern political societies is absolutely necessary to the continued existence of every such society. While under such forms of government the ancient chiefs or heads of the government might carry it on by revenues owned by them personally, and by the exaction of personal service from their subjects, no civilized government has ever existed that did not depend upon taxation in some form for the continuance of that existence. To hold, then, that any one of the annual legislatures can, by contract, deprive the state forever of the power of taxation, is to hold that they can destroy the government which they are appointed to serve, and that their action in that regard is strictly lawful."

The charter exemption upon which respondent relies contains no limitation upon the amount of property which may be withdrawn by the respondent from the tax rolls of the State and its municipalities. There is no limitation upon the duration of this exemption. Such an exemption is in derogation of the taxing power of the State—the most basic power of government—and should not, therefore, be protected under the contract clause of the Federal Constitution.

(B) The alleged "contract" upon which the respondent relies is subject to the reserved power of the sovereign State of Missouri to levy and collect taxes.

We have heretofore commented upon the fundamental nature of the power of taxation and have pointed out that it has been recognized as one of the powers essential to the maintenance of government. We, therefore, contend that the reservation of this vital power must be read into the alleged contract upon which the respondent relies. This Court has, in the case of *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398, established the principle that:

> "• • • the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order."

The attribute of sovereign power which was involved in the Blaisdell case was the right of the State to exercise its protective power as it relates to the economic welfare of the people of the State. This power was held to include the right to safeguard the economic interests of the State in a time of emergency. The emergency which confronted the State of Minnesota at the time of the enactment of the legislation involved in this case was held to "furnish the occasion" for the exercise of the power

reserved to the State to safeguard the vital interests of the people of the State. It is thus held by this Court that where the economic welfare of the people of a state is imperiled, legislation to remedy such a situation should be held valid even though it has the effect of impairing the obligation of a contract.

At the time the people of the State of Missouri adopted the State Constitution of 1865 with the provision repealing special tax exemptions, the State was confronted with an economic crisis of considerable magnitude. This condition was described by Judge Wagner in his opinion in the Rowse case, *supra*, in the following language, l. c. 326:

> "In 1853 taxes were light and the State debt was small, and exemptions could be made without great detriment. After that period the State embarked in a false and ruinous system of loaning its credit to corporations, by which it incurred an immense debt; then followed the Civil War, which increased its already burdensome obligations, and taxation became exceedingly onerous.
>
> "In this condition of things it was deemed the part of wisdom to make all property within the jurisdiction of the State, receiving the benefit of her laws and protection, contribute its proper proportion and share the common burdens. This was entirely a matter resting in the sound discretion of the legislative branch of the government, and we have been unable to find any objection to their exercise of the power."

The financial condition of the State resulted from certain infirmities in the Constitution of 1820. It was for the purpose of eliminating these infirmities that the Constitution of 1865 was adopted. At the time this Constitution was adopted, the evils resulting from the surrender of the taxing power by means of numerous special tax exemptions had become apparent. The people of the State,

in order to correct this condition, in effect declared in their Constitution that all such exemptions were void. These evils which were so painfully felt during the State's period of economic crisis were certainly subject to correction in the exercise of the reserved power of the State to safeguard the vital interests of the people. *Veix* v. *Sixth Ward Building & Loan Assn. of Newark*, 310 U. S. 32, 39. This case extends the doctrine of the Blaisdell case to legislation of a permanent nature designed to correct inherent weaknesses in the economic structure of the State.

Under the foregoing authorities, the constitutional provision repealing respondent's alleged tax exemption cannot be considered invalid on the ground of impairment of the "contract" of the respondent with the State.

(C) The "contract" of the respondent is not irrevocable and therefore is not protected by Section 10 of Article I of the Federal Constitution.

In addition to the reserved right of the State to safeguard the vital interests of the people of the State, which we have considered in part (B), *supra*, there are certain other features of the respondents alleged contract which make it subject to the control of the people of the State and the State Legislature.

The proposition that a contract which may by its terms be revoked by the State is not protected by Section 10 of Article I of the Constitution of the United States, is well established. This principle is tersely stated in the case of *Northern Central Ry. Co.* v. *Maryland*, 187 U. S. 258, 267, as follows:

> "In considering this question it will be borne in mind that it is elementary that where the constitution of a state reserves the right to repeal, alter or amend, all charters granted by the legislature are subject to such provision, and therefore are wanting in that attribute of irrevocability which is essential

to bring them within the intendment of the clause of the Constitution of the United States protecting contracts from impairment. The cases supporting this doctrine are so numerous that they need not be cited."

At the time the charter containing the tax exemption was granted to Eliot Seminary, the Constitution of Missouri of 1820 was in effect. Section 2 of Article XIII of this Constitution provided:

"* * * That the people of this state have the inherent, sole and exclusive right of regulating the internal government and police power thereof and of altering and abolishing their constitution and form of government whenever it may be necessary to their safety and happiness."

This constitutional provision must, of necessity, be considered as a term of the charter of Eliot Seminary which was granted while it was in effect. *Von Hoffman* v. *Quincy*, 4 Wall. 535, 550. Pursuant to this constitutional provision, the people of the State of Missouri in 1865 adopted a new Constitution by which all special exemptions from taxation were declared to be void. Thereafter the Legislature provided for the taxation of all property except that expressly exempt from taxation by the provisions of the Constitution of 1865.* The charter of Eliot Seminary was, we think, necessarily accepted by this institution subject to the reserved right of the people of the State of Missouri to change their Constitution, and it cannot therefore be said that the provision of the Con-

*Section XVI, Article XI of the Constitution of Missouri of 1865:
"No property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to this state, to counties, or to municipal corporations within this state."

stitution of 1865 above referred to has the effect of impairing a contract which was accepted subject to this reserved right.

In 1875 the people of the State of Missouri again adopted a new Constitution. Section 6 of Art. X thereof enumerates the classes of property that may be exempted from taxation. Section 7 of Art. X of this Constitution provides:

> "Sec. 7. Other exemptions void.—All laws exempting property from taxation, other than the property above enumerated, shall be void."

The respondent has conceded that the provisions of the Constitutions of 1865 and 1875, here in question, do, if valid, have the effect of repealing the respondent's tax exemption. It is not contended by the respondent that the property involved in this action is within the exemptions enumerated in either of these two Constitutions.

There was also in full force and effect at the time the charter here involved was granted to Eliot Seminary, a general law concerning corporations, Section 7 of which provided:

> "The charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension and repeal in the discretion of the legislature."

The original charter of Eliot Seminary attempted to except the charter of this institution from the provision of the general law above set out. The exception in the charter was as follows:

> "* * * All property of said corporation shall be exempt from taxation and the sixth, seventh and

eighth sections of the first Article of the Act concerning corporations, approved March 19th, 1845, shall not apply to this corporation."

This attempt on the part of the Legislature to except the charter of Eliot Seminary from the general statute was commented upon by the Missouri Supreme Court in the Rowse case as follows, l. c. 325:

"No importance or weight can be attached to that provision of the charter of the defendant in error which excludes it from the operation of the seventh section of the general law in relation to corporations. It is incompetent, as before observed, for one Legislature to attempt to derogate from the power or tie up the hands of a subsequent Legislature. For an irrepealable contract of the character here presented no authority or precedent is to be found. Whilst the exemption continued, the property was free from taxation; but when the law was repealed, it then fell back in the general mass—liable, like all other property, for the burdens of government."

Therefore, by the law of the State of Missouri, the charter of Eliot Seminary was accepted subject to the reserved right of the Legislature to alter, suspend or repeal any of its provisions.

On February 12, 1857, the Legislature approved an act to amend the charter of Eliot Seminary. Section 1 of the amendatory act was as follows:

"Section 1. The name of the corporation known as 'The Eliot Seminary' shall henceforth be 'The Washington University,' by which name the said corporation shall have, hold and enjoy all the property, rights, franchises, endowments, immunities and privileges conferred upon and belonging to the Eliot Seminary."

This amendatory act by which the charter of Eliot Seminary purported to be transferred to the respondent was not excepted from the operation of Section 7 of the general act relating to corporations which was in effect at the time the amendatory act was passed. The amendatory act was therefore accepted by the respondent subject to the right of the Legislature to alter, suspend or repeal it in its discretion. *Hoge* v. *Railroad Company,* 99 U. S. 348, l. c. 354,* and *San Antonio Traction Company* v. *Altgelt,* 200 U. S. 304; *Planters' Insurance Company* v. *Tennessee,* 161 U. S. 193; *Memphis City Bank* v. *Tennessee,* 161 U. S. 186. It is our contention that the acceptance of the amendatory act of 1857 by the respondent rendered its charter subject to the provisions of the general law which were in effect at the time of this acceptance.

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*"If it be assumed, however, that by the act incorporating the Air Line Company it acquired not only the immunity from taxation which the Greenville and Columbia Company possessed, but also its original exemption from future legislative control, this exemption ceased when the company obtained an amendment to its charter in September, 1868, before its consolidation with the Georgia Company. By that amendment the charter of the company was at once brought under the control of the legislature by virtue of the act of 1841, the act granting the amendment containing no clause excepting the charter from the provisions of that act."

Conclusion.

We respectfully submit:

(1) That the Supreme Court of Missouri misconstrued the effect of the ruling in *Erie Railroad Company* v. *Tompkins* by denying its application or relevance to a case in which the contract clause of the Constitution is invoked, and erroneously concluded that this Court's decision in *Washington University* v. *Rouse* was "commandingly decisive" of the case at bar.

(2) That regardless of the views of this Court as to the better rule as to what constitutes a valid consideration to support a binding contract, this Court, in passing upon the question as to whether or not there is a contract, should accept the determination of the state Supreme Court as to the facts necessary to constitute a legal consideration essential to a binding contract.

(3) That regardless of the question of the applicability of the rule announced in *Erie Railroad Company* v. *Tompkins* to the case at bar, the decision of the Supreme Court of Missouri should be reversed, for the reason that the Missouri Supreme Court in its decision in the instant case felt bound to and did follow the majority opinion of this Court in *Washington University* v. *Rouse*, which majority opinion is unsound and should be overruled.

Respectfully submitted,

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